IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 104

STATE OF NEW JERSEY AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,

Appellants,

vs.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

STATEMENT AS TO JURISDICTION.

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Appellants, State* and Board*, appeal from so much of the final judgment of the District Court entered on January 9, 1962 as determines that the provisions of section 13a(1) of the Interstate Commerce Act (49 U. S. C. sec. 13a (1)) were properly invoked by the New York, Susquehanna and Western Railroad Company (hereinafter referred to as "Appellee") for the purpose of effecting a discontinuance of its passenger trains enumerated in the Notice filed

* Throughout this Statement as to jurisdiction we will refer to the State of New Jersey as "State" and the Board of Public Utility Commissioners of the State of New Jersey as "Board" or jointly as "Appellants."

with the Interstate Commerce Commission (hereinafter sometimes referred to as "I. C. C."). The I. C. C. Order of January 18, 1961, refusing to take jurisdiction on the ground that the train operation was solely intrastate, was thereby set aside as contrary to law. Appellants submit this statement in compliance with Rule 13(2) of the Revised Rules of the Supreme Court of the United States to show the basis upon which the Supreme Court has jurisdiction on appeal to review said judgment of the District Court, and that the questions presented are substantial.

Opinions Below.

The following are printed as appendices hereto

APPENDIX A—Opinion of the District Court filed December 7, 1961 and reported in 200 F. Supp. 860.

APPENDIX B—Final judgment of the District Court dated January 9, 1962.

APPENDIX C—Initial order of the I. C. C. dated January 18, 1961, not yet reported, dismissing for lack of jurisdiction the Appellee's notice filed December 30, 1960.

APPENDIX D—Order of the I. C. C. dated May 10, 1961 denying Appellee's motion for reconsideration of the I. C. C.'s order of January 18, 1961.

Basis of Jurisdiction.

This suit was brought under 5 U. S. C. Section 1009; 28 U. S. C. Sections 1336, 1398, 2284, 2321 to 2325 inclusive; and 49 U. S. C. Section 17(9), to review, suspend, enjoin, annul and set aside the orders of January 18, 1961 and May 10, 1961 entered by the I. C. C. in dismissing the Notice filed by the Appellee. The Appellee filed the Notice pursuant to the provisions of 49 U. S. C. section 13a(1) to dis-

continue all its passenger train service. The operation is by train from Butler, New Jersey, to a point called Susquehanna Transfer, located in the Township of North Bergen, New Jersey, thence from Susquehanna Transfer to the Port Authority Bus Terminal, New York City, New York, by contract bus operated for Appellee's passengers by Public Service Coordinated Transport Co. over a public highway. The final judgment of the District Court for the District of New Jersey (Circuit Judge McLaughlin dissenting) was dated January 9, 1962, and entered on the docket January 11, 1962. Notice of appeal was filed in the District Court for the District of New Jersey on March 6, 1962. A cross-appeal by the Appellee was served on the Appellant on March 7, 1962. The jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b). There are many decisions which sustain the jurisdiction of the Supreme Court to review the judgment by direct appeal in this case. *Chicago, Milwaukee, St. P. & P. R. Co. v. State of Ill.*, 355 U. S. 300 (1958); *Alleghany Corporation* v. *Breswick & Co.*, 353 U. S. 151 (1957); *Pan-Atlantic St. Corp.* v. *Atlantic Coast L. R. Co.*, 353 U. S. 436 (1957); *Radio Corp. of America* v. *United States*, 341 U. S. 412 (1951); *Board of Public Utility Com'rs of N. J.* v. *United States*, 158 F. Supp. 98 (D. C. N. J. 1957), probable jurisdiction noted; 357 U. S. 917 (1958); *Board of Public Utility Com'rs of N. J.* v. *United States*, 158 F. Supp. 104 (D. C. N. J. 1957), probable jurisdiction noted, 357 U. S. 917 (1958).

Statute Involved.

The statute primarily involved is Section 13a of the Interstate Commerce Act (49 U. S. C. §13a which is set forth in Appendix E hereto), with particular reference to subsection 13a(1).

Questions Presented.

1. Whether the Interstate Commerce Commission lawfully dismissed Appellee's notice of discontinuance for lack of jurisdiction under section 13a(1) of the Interstate Commerce Act, when the trains to be discontinued operate exclusively within the State of New Jersey.

2. Whether subsection 13a(1) of the Interstate Commerce Act may be construed as referring to intrastate railroad service plus interstate autobus service, when the subsection by its very terms is limited to the discontinuance of "a train or ferry operating from a point in one State to a point in any other State," and when the legislative history of the subsection supports the view that it was intended to cover no more than a train or ferry.

3. Whether the railroad should have applied for relief under subdivision (2) of section 13a rather than under subdivision (1) of section 13a of the Interstate Commerce Act.

Statement of the Case.

On the 29th and 30th of December, 1960, the Appellee posted notices dated December 29, 1960 that it would discontinue all of its passenger service, effective January 30, 1961. This was done pursuant to Section 13a(1) of the Interstate Commerce Act.

On January 9, 1961, the State and the Board filed a petition with the I. C. C. seeking a dismissal of the Appellee's notice on the ground that the Commission lacked jurisdiction, because the *trains* involved are operating solely within New Jersey, and the service is not that of "any train or ferry operating from a point in one state to a point in any other state...."* While passengers may travel between

* Section 13a(1), set out in Appendix E, p. 45 hereof.

Butler, New Jersey and New York City, the *trains* and the *tracks* on which they operate extend from Butler to Susquehanna Transfer in North Bergen, entirely within New Jersey, the passengers then being transported between Susquehanna Transfer in North Bergen and the Port Authority Terminal in New York City by contract bus on a public highway. The I. C. C., by its Order of January 18, 1961, dismissed the notice on the ground that the *trains* involved operated solely within the State of New Jersey, and that the notice therefore did not constitute a notice properly filed under Section 13a(1). Thereafter, on February 20, 1961, the Appellee filed with the I. C. C. a petition for reconsideration of the Order entered January 18, 1961. This petition was denied by I. C. C. order of May 10, 1961. The Appellee commenced an action, on May 18, 1961, in the United States District Court for the State of New Jersey challenging the I. C. C. Orders of January 18, 1961 and May 10, 1961. Subsequently, a statutory three-judge Court was convened to hear the matter.

The opinion of the Court, with one judge dissenting, *New York, Susquehanna & Western R. Co.* v. *United States*, 200 F. Supp. 860, 866 (D. C. N. J. 1961), " . . . that the Commission had jurisdiction over the proceeding instituted by Susquehanna under the provisions of section 13a(1) and that its order of January 18, 1961 refusing to take jurisdiction thereof was contrary to law, and should be reversed.", was filed December 7, 1961. The basis of the decision was that the bus service complemented that of the train, and vice versa, and that the combination of the two facilities, a train plus a bus, thus operating from a point in one State to a point in another State, was within the intent of Congress when it enacted Section 13a(1). Circuit Judge McLaughlin dissented on the ground that " . . . the section was directed to a particular train or ferry and the legislative history makes this crystal clear." *Id.* at 867.

Judge McLaughlin went on to say, "The statute is a lean, lucid law. It cannot be misconstrued as it stands. The majority opinion refuses to take on that impossible task. So it rests its reversal of the Interstate Commerce Commission on the proposition that what the latter does in its decision is 'thwart the *apparent* purpose of Congress in adopting it.' (Emphasis supplied.) Actually, the true purpose of Congress is expressed in the unmistakable language of 13a(1) itself. That language cannot be wrenched apart to absorb the expedient endeavor to do now what was never contemplated when the amendment was enacted." *Ibid.*

The final judgment of the District Court was entered on the docket January 11, 1962. It provided *inter alia* that the I. C. C. Order of January 18, 1961 was contrary to law; therefore, the Order was permanently suspended, enjoined, annulled and set aside. Furthermore, the Appellee was enjoined from discontinuing passenger service, until the further Order of the Court, pending appeal by Appellants to the Supreme Court of the United States.

On March 6, 1962, the State and the Board filed a notice of appeal to the Supreme Court of the United States in the U. S. District Court for the District of New Jersey. A cross-appeal by the Appellee was served on the State and the Board on March 7, 1962.

The Questions Presented are Substantial.

A. The Jurisdictional Question

The jurisdictional issue here is not only of importance to the parties herein. It is, also, of national importance because it relates to a conflict of jurisdiction over interstate and intrastate commerce between the National Gov-

ernment, acting through the I. C. C. and the States. Traditionally, this Court has always been the final arbiter of the competing demands of State and national interests.

The conflict of jurisdiction arises from the fact that if the three-judge Court decision is allowed to stand, State authority over intrastate train operations will be greatly diminished. This, because the I. C. C. will have jurisdiction in every instance where a purely intrastate train operation combines with an interstate bus to cross a state line. There are numerous examples of such operations in New Jersey, as will be seen below, and presumably in other States. The inherent (and reserved) power of the States over intrastate matters faces extinction with no clear indication that Congress intended any such result. The precedent set, therefore, has a far-reaching effect beyond the interests of the litigants here.

Congress intended, by the enactment of section 13a(2) of the I. C. C. Act, to preserve State jurisdiction over " . . . any train or ferry operated wholly within the boundaries of a single State . . . ." The language is clear and unambiguous, as is the wording in section 13a(1) of the same Act which grants to the I. C. C. the jurisdiction over " . . . the discontinuance . . . of any train or ferry . . . ," but not a bus. Clearly, the impact of the instant decision is to frustrate the intent of Congress as expressed in section 13a(2). Just as the Federal Government jealously guards its constitutional prerogative in the interstate commerce domain so the States have an equal and inherent right to protect their interests in intrastate commerce. No such vested State interest should be taken away by implication which is the result of the decision below.

The effect of the decision would immediately touch other intrastate rail operations in New Jersey. In southern New

Jersey, the Pennsylvania Railroad Company and the Pennsylvania Reading Seashore Lines operate lines to Camden, New Jersey where passengers bound for Philadelphia, Pennsylvania may transfer to a bus or a subway. The Pennsylvania Railroad Company, in northern New Jersey, transports passengers from New Jersey to downtown New York via its trains with a transfer at Newark to Hudson Rapid Tubes Corporation interstate trains. Furthermore, the Central Railroad Company of New Jersey intrastate train operation runs to its terminal in Jersey City, New Jersey where its interstate ferry service is available to New York City, New York. Lastly, Hoboken, New Jersey, is the terminal of the Erie Lackawanna Railroad Company intrastate train operation with its ferry, or with train or bus connections from there to New York City. In each instance, the holding of the court below could be construed to subordinate State authority to that of the Federal Government.

Undoubtedly, the interest of the public is the paramount consideration in any train discontinuance. But if subsection 13a(2) may be by passed the rigid standards set forth therein would also be evaded to the detriment of the traveling public. Section 13a(2) requires that the State authority first pass upon the question of an intrastate train or ferry discontinuance. If the State authority denies relief, the carrier may petition the I. C. C. for authority to discontinue the operation. However, the I. C. C. may grant the authority only after full hearing and findings [illegible] the premises on future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry and [illegible] operation or service of such train or ferry without discontinuance or change, in whole or in part, will [illegible]

operations of such carrier or carriers or upon interstate commerce."

1. States may control intrastate commerce.

The U. S. Constitution expressly grants to Congress the power to regulate commerce "among the several States." U. S. Constit. *Art. I, §8, clause 3.* On the other hand, "the powers not delegated to the United States by the Constitution . . . are reserved to the States respectively . . . ." *U. S. Constit. Amend. X.* Even as to interstate commerce, unless Congress has granted authority to the I. C. C. or another federal agency, the power to regulate and control rests with the State and its agencies. *Palmer* v. *Commonwealth of Massachusetts,* 308 U. S. 79 (1939); *Eichholz* v. *Public Service Commission,* 306 U. S. 268 (1939); *Port Richmond & Bergen Point Ferry Co.* v. *Board of Chosen Freeholders of Hudson County,* 234 U. S. 317 (1914); *State of Colorado* v. *United States,* 271 U. S. 153 (1926). Moreover, if the Board fails to take appropriate steps on a matter so vital to the public as the continuance of rail passenger service, it is derelict in the performance of its statutory duties. The Board is authorized to ". . . require any public utility to furnish safe, adequate and proper service . . . ." *R. S. 48:2-23.* Also, no railroad shall discontinue service without obtaining permission from the Board. *R. S. 48:2-24.* Before the Board may grant the authority to discontinue, it must find (1) "that the discontinuance, curtailment or abandonment of such service will not interfere with the public convenience and necessity and, (2) "that there is adequate substitute service available." *R. S. 48:2-24.* If the railroad is permitted to use the train-bus device to bring it within the terms of section 13a(1) the state shall never have the opportunity to make the determination called for in the state statutes, thus effectively nullifying section 13a(2) for New Jersey.

2. The Statute, Section 13a(1) of the I. C. C. Act, speaks not of "buses" but only of "a train or ferry."

The District Court was bound by the plain and unambiguous language of the statute, section 13a(1). *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85 (1935); *United States* v. *Standard Brewery*, 251 U. S. 210 (1920); *Hamilton* v. *Rathbone*, 175 U. S. 414 (1899); *Thompson* v. *United States*, 246 U. S. 547 (1918).

It could not alter the terms and thus enact instead of construe the law. The plain language of the statute is ". . . operation or service of any train or ferry, . . ." Clearly, the type of service contemplated by Congress did not include buses. As said by this Court, a train consists of "an engine and cars which have been assembled and coupled together for a run or trip along the road." *United States* v. *Erie R. Co.*, 237 U. S. 402, 407 (1915). Also, it has been said by this court that a "ferry is a continuation of the highway from one side of the water over which it passes to the other. . . ." *County of St. Clair* v. *Interstate Sand & Car Transfer Co.*, 192 U. S. 454 (1904). To include a bus within the meaning of the term "train" or "ferry" would do violence to the intent of Congress. This position is fortified by the Conference Committee report which led to the enactment of section 13a of the I. C. C. Act.

The Transportation Act of 1958 (72 Stat. 568), which includes section 13a, was enacted after a Conference Committee worked out the differences between the two Houses of Congress. Senate Bill No. 3778 was passed in lieu of the House Bill. The conference report contains not even a suggestion that bus service was contemplated in the enactment of section 13a. Rather the language is always limited to train or ferry. Thus, the report states that section 13a, added to the I. C. C. Act, relates to ". . . operation or service of *trains* or *ferries*. . . . Paragraph (1) deals with

the discontinuance or change of the operation of a *train* or *ferry*. . . . The Commission [I. C. C.] may require that the *train* or *ferry* be continued in operation or service pending a decision by it. . . . Paragraph (2) of the proposed new section 13a, as contained in the bill and agreed to in conference, deals with . . . a carrier or carriers of the same class referred to in paragraph (1), of the operation or service of any *train* or *ferry* operated 'wholly within the boundaries of a single state.'" (Emphasis added.) *1958 U. S. Code Congressional and Administrative News*, pp. 3486, 7.

Congress could have used other terms in subsection 13a(1) but it *intentionally* settled on "train" and "ferry." This, because the Congressional hearings before enactment of the section are replete with the two terms. The term "bus" is never mentioned. The over-all intention of Congress is clear—to pre-empt jurisdiction where a state line is crossed by "the operation or service of any train or ferry," but in all other situations to preserve existing states' rights and to limit the proposed extension of I. C. C. jurisdiction to a train or ferry. Section 13a, and in particular subsection 13a(2), however narrowly construed, constituted a giant step in the direction of increasing I. C. C. jurisdiction. This step was hotly debated and had to go before a Senate-House Conference Committee before it was rendered agreeable to both Houses of Congress.

If Congress had intended, under section 13a(1), to authorize the discontinuance of more than the "operation or service" that is in fact provided by a "train or ferry," it could have easily so provided. For instance, it could have used terms of broader import, such as "railroad" or "transportation" as defined in the I. C. C. Act; section 1(3)(a) defines both terms: "Railroad," therein, denotes "bridges, car floats, lighters, and ferries used by or oper-

ated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property." The term "transportation" means "locomotives, cars, and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof . . . ." Because these terms have established meanings under the I. C. C. Act, they were well known to Congress. Since the narrower terms "train" or "ferry" were used, the presumption is that the authority granted to the I. C. C. is limited by the customary meaning of the terms adopted.

There might be some basis for the view that "any train" was used in a generic sense, had the statutory provision stopped there. But it appears that Congress contemplated one other auxiliary type of service by adding to "any train . . . ," the words " . . . or ferry" (and stopped *there*); it therefore requires something more than mere interpretation or construction to incorporate in the statute words (and more importantly, concepts) which the Congress rather pointedly left out.

3. The Federal District Court has recognized that Section 13a(1) is limited to the discontinuance of a train or ferry.

The only cases that have construed the statute here involved, 49 U. S. C. §13a(1), are the ferry abandonment cases initiated by the New York Central Railroad Company ("Central") in one instance, and by the Erie Railroad

Company ("Erie") and by the present Appellee, in another instance. Both actions were begun before the enactment of section 13a(1) in 1958. The interstate ferries (between New Jersey and New York) there connected with intrastate and interstate trains in New Jersey. While the passenger ferries were proposed to be abandoned. the freight ferries were to remain in operation. The I. C. C., in both cases, granted the authority to abandon claiming it had jurisdiction under 49 U. S. C. §1(18). *New York Central Railroad Co. Ferry Abandonment*, 295 I. C. C. 385 (1956); *New York Central Railroad Co. Ferry Abandonment*, 295 I. C. C. 519 (1957); *Erie Railroad Co. Ferry Abandonment*, 295 I. C. C. 549 (1957). The statutory three-judge Court reversed the above I. C. C. decisions. *Board of Public Utility Com'rs of N. J.* v. *United States*, two cases, 158 F. Supp. 98 and 158 F. Supp. 104 (D. C. N. J. 1957), probable jurisdiction noted, 357 U. S. 917 (1958). The Court held that the proposed cessation of ferry service constituted a "partial discontinuance" of the railroad operation and that therefore the I. C. C. (which by statute, 49 U. S. C. §1(18), had jurisdiction only to permit complete abandonment) was without jurisdiction to permit the discontinuance in question. The crucial part of 49 U. S. C. §1(18) reads:

> "... no carrier by railroad ... shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

The District Court decisions were appealed to this Court. Simultaneously, Congress was deliberating on what eventually became the "Transportation Act of 1958." This Court noted probable jurisdiction but before argument the matter

was rendered moot by the passage of the 1958 Transportation Act which included section 13a(1) and (2). Subsequently, the State and the Board brought two unsuccessful declaratory judgment actions to test the constitutionality of section 13a(1). In one of the two decisions upholding the statute, *State of New Jersey* v. *United States*, 168 F. Supp. 324 (1958), at page 337, Circuit Judge McLaughlin in dissenting, stated:

> "The admitted reason for the passage of the section was our decision in Board of Public Utility Commissioners of New Jersey *v.* United States of America, D.C.D.N.J. 1957, 158 F. Supp. 98.[1] In the effort to obtain legislation which would enable this railroad or any railroad to summarily wipe out of existence any individual train or ferry or line of trains and ferries within the reach of the amendment the all pervading effect of the immediately preceding Section 13(1) and (2) was quite apparently overlooked; in any event its authority was in nowise restricted."

The footnote just after the citation of the case within the above quotation refers to a statement made by Central's counsel at the hearing on the application in that suit for a preliminary injunction. He stated, "I want to say to the Court . . . if you go back to the testimony before the committees, you'll find that this particular case was the reason for the enactment of this section." *State of New Jersey* v. *United States, supra*, p. 337.

4. The Interstate Commerce Commission has only such power as is granted to it by Congress; here, Section 13a (1) and (2), 49 U. S. C. §13a(1) and (2).

The Interstate Commerce Commission is an administrative tribunal whose jurisdiction derives solely from the act creating it. This jurisdiction is defined by statute and the Commission may not attempt to exercise any jurisdic-

tion not expressly conferred by statute or reasonably implied therein. *Seatrain Lines* v. *United States*, 64 F. Supp. 156 (D. C. Del. 1947), aff'd 329 U. S. 424 (1947).

Although the original Interstate Commerce Act was enacted in 1887, it was not until 1920 that the Congress undertook to occupy and delegate to the Commission jurisdiction over the abandonment of railroad lines. Transportation Act of February 28, 1920, 41 Stat. 477, par. 18, 49 U. S. C. §1(18). This enactment bestowed upon the Commission large powers which formerly had been exercised by the several states; however, the jurisdiction was limited to abandonment of a line of railroad as distinguished from a partial discontinuance or curtailment of service. As to the latter, the Commission had no jurisdiction under section 1(18) of the act. *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939). This was the state of the law when the above-mentioned ferry cases were being decided.

Prior to the passage of the Transportation Act of 1958, while the bill was under consideration in the Senate Committee on Interstate and Foreign Commerce, the prior limitation on the jurisdiction of the I. C. C. was thus explained by Senator Smathers, the sponsor of the bill:

> "Mr. Kuchel. Under the present law, when a railroad operates in two contiguous states, if a train originates in one of the States and stops in the State, and then crosses the State line and stops in the other State, what jurisdiction, under the present law, does the Interstate Commerce Commission exercise over the operation?
>
> "Mr. Smathers. It exercises all jurisdiction with respect to the rates, and things of that character. With respect to a discontinuance, at the moment the Commission does not exercise any jurisdiction with respect to the discontinuance of a specific train, although they have complete authority with respect

to bringing about a total abandonment of the whole line or any part of it.

"Mr. Kuchel. Does the jurisdiction over how and when that railroad shall run its trains in State A and State B rest in the discretion of the State public utilities commissions in State A and State B?

"Mr. Smathers. Only with respect to discontinuance; yes. The answer is 'Yes.'" *104 Cong. Rec. 10852* (1958).

The new statute grants the I. C. C. jurisdiction over interstate train or ferry discontinuance or change. At the same time it explicitly acknowledges that the states also have jurisdiction of such matters; it gives a railroad the option of selecting either forum.

The language of the new law makes this clear. It contemplates state regulation since the only carriers to which it applies are those "subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding before) any court or administrative or regulatory agency of any State . . . ." A carrier desiring to discontinue an interstate train or ferry, according to the statutory terms, "may, but shall not be required to" file a notice with the Interstate Commerce Commission; in other words, it can, if it wishes, take its application to the state regulatory agency. Finally, the statute provides:

> " . . . *The provisions of this paragraph shall not supersede the laws of any State* or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change *unless notice* as in this paragraph provided *is filed with the Commission. On the expiration of an order by the Commission* after such investigation requiring the continuance or restoration of operation or service, *the jurisdiction of any State* as to such discontinuance or change *shall no longer be super-*

seded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers." (Emphasis added.)

In sum, it is clear that the passage of the new law did not pre-empt local regulation of an interstate train or ferry. On the contrary, the new statute declares unequivocally that the federal government desires state authority over a train or ferry to continue.

It is a familiar rule that a construction made by the body—here, the I. C. C. in relation to section 13a—charged with the enforcement of a statute, although not controlling, may be resorted to as an aid in ascertaining the legislative intent. *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361 (1906); *New York Central Securities Corporation* v. *United States,* 287 U. S. 12 (1932); *Boston & M. R. Co.* v. *Hooker,* 233 U. S. 97 (1914). This doctrine of contemporaneous construction of a statute applies to section 13a, because the I. C. C. has acted pursuant to its authority under that law. Moreover, this Court has said that, under certain circumstances, the I. C. C. construction of a statute may "be treated as read into the statute." *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission, supra,* p. 402.

The I. C. C. has recognized state jurisdiction under both section 13a(1) and 13a(2) of the I. C. C. Act. In a recent case before the I. C. C. (*Pennsylvania Railroad Company and Pennsylvania-Reading Seashore Lines, Discontinuance of Passenger Train Service,* Finance Docket Nos. 21606 and 21607, I. C. C., April 4, 1962, not yet reported), the Pennsylvania Railroad Company and the Pennsylvania-Reading Seashore Lines petitioned to discontinue both intrastate and interstate passenger train service. The Commission interpreted sections 13a(1) and 13a(2) to mean that under the former a carrier has the election to go before the I. C. C.

or a state commission respecting interstate train discontinuance. However, as to an intrastate discontinuance, the carrier is required first to seek relief before a state commission. The Commission stated, "With respect to carriers wishing to discontinue the operation of trains operated wholly within a single state, they are not accorded an election under the provisions of section 13a(2) such as is provided in section 13a(1). They first must proceed to seek relief from the appropriate state regulatory body before petitioning this Commission for relief, and section 13a(2) specifically prescribes the conditions that must be met before we acquire jurisdiction." The carriers there had properly proceeded initially pursuant to section 13a(2); here, the Appellee immediately petitioned under section 13a(1), disregarding section 13a(2). In the former case, some tracks and trains were interstate. A similar showing cannot be made in the instant case because the tracks are wholly within New Jersey and the trains operate wholly within this State.

The Commission went on to say: "Carriers may elect to disregard both sections, and rely solely upon the appropriate state regulatory commission for authority to discontinue certain interstate or intrastate trains. If a carrier determines to rely upon the state commissions for a portion of the relief desired, and under the provisions of section 13a(1) for additional relief from this Commission, our jurisdiction is restricted to a consideration of the specific proposals involved in the proceeding filed with us." Regarding the discontinuance of intrastate operations, section 13a(2) does not provide an alternative method (either before the I. C. C. or a state commission) as does section 13a (1). Instead, states retain primary jurisdiction over trains operated solely within their respective boundaries. Thus, "The state continues to retain original jurisdiction to

authorize the discontinuance . . . of trains operated solely within its boundaries, and the carrier may act upon the authority granted, notwithstanding the fact it may wish to invoke the jurisdiction of this Commission if portions of its application are denied by the State . . . they [carriers] were in no way obligated to retain that service as a condition precedent to filing the instant proceeding with this Commission."

B. Assuming, but not conceding, that 49 U. S. C. §13a(1) is ambiguous, a reference to the record of the legislative hearings on the bill reveals that the literal meaning of "train" and "ferry" was intended—thereby excluding any inference of a "bus" operation within the meaning of the statute.

Debates and reports in Congress with reference to a statute are a reliable extrinsic guide to the legislative intention. *United States* v. *Congress of Industrial Organizations*, 335 U. S. 106 (1948); *Mitchell* v. *Kentucky Finance Company*, 359 U. S. 290 (1959).

Congress in debating the merits of the bill, was aware of the existing law and realized that the bill would not pre-empt state jurisdiction over railroad train discontinuances. We have the words of the Chairman of the House Committee on Interstate and Foreign Commerce, Congressman Oren Harris:

> "Mr. Harris. . . . Section 4 of the bill adds a new section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than the State Commissions, pass upon the discontinuance or change in the operation or service of any train or ferry. This option is limited, however, to the operation or service of a train or ferry on a line of railroad not located wholly within a single State. This limitation is contained in the

bill being reported because the Committee feels that the record at this time does not support the broader change in venue, requested by the railroads, which would have covered Interstate Commerce Commission jurisdiction also over operations more local in character, such as those of a branch line or other line of railroad located solely within one State.

"The bill as introduced also covered the Interstate Commerce Commission passing upon discontinuance or change of the operation or service of stations, depots, or other facilities. This jurisdiction has not been included in the bill as reported, as the committee believes the record presented in its hearings does not support the need for transferring such jurisdiction from State regulatory bodies." 104 Cong. Rec. 12533 (1958).

Clearly, Congress specifically intended the Commission to exercise a limited jurisdiction under section 13a(1) only in regard to the discontinuance of particular train or ferry equipment and not including stations, buses or other facilities. Section 13a(1) was meant as a supplement to the Commission's existing authority under section 1(18) of the Act to sanction total abandonment of a particular line of railroad in interstate commerce. In order that a railroad might reduce service without abandoning its entire line, this lesser authority was granted.

While Congress never defined the phrase "operation or service" used in 13a(1) in connection with train or ferry, nevertheless, it can be seen from their deliberations that the legislators never thought it included buses:

"Mr. Avery. . . . It [bill] provides some changes in the jurisdiction of discontinuance or change in operation and service on interstate commerce. Under present law, services and operations are left to the jurisdiction of State regulatory bodies, but the

> abandonment of a line lies strictly with the Interstate Commerce Commission . . . the committee bill provides that the railroads may have the Interstate Commerce Commission, rather than a State commission, pass upon the discontinuance or change in service on a rail line. This option to the railroads exists only if the line affected does not exist entirely within a single State." *104 Cong. Rec. 12538* (1958).

The services and operations just mentioned could easily have been associated with the term "bus" but they were not. This is significant. Evidently Congress made a distinction between operation or service of a train or ferry on the one hand and total abandonment on the other. The discontinuance of the "operation or service of any train or ferry" was to be something less than total abandonment of a line of railroad over which the I. C. C. already had jurisdiction —for example, the curtailment of the single train or ferry, as contrasted with the total abandonment of a line of railroad, which ran in interstate commerce over which the respective states and not the I. C. C. had jurisdiction. This was the only situation that was meant to be remedied by the pending legislation. Moreover, if the line was wholly intrastate, the historical state jurisdiction was not to be disturbed by the bill, except that the I. C. C. would have the right to review state decisions or state inaction.

After the issues in the bill were resolved by the Conference Committee, Senator Magnuson, Chairman of the Senate Committee on Interstate and Foreign Commerce, entered in the Congressional Record an explanation of the results, entitled, "Explanation of S. 3778, The Transportation Act of 1958, as approved by the conferees."

> "The section would grant authority to discontinue service rendered by trains and ferries crossing State lines to the Interstate Commerce Commission.

> . . . This provision, however, would not deprive the carrier of the right to go to State Commissions to ask for discontinuance of trains crossing State lines.
>
> . . .
>
> "State regulatory commissions would retain jurisdiction over stations, depots, and other such facilities." *104 Cong. Rec. 15527, 8* (1958).

Thereafter, Senator Smathers, a member of the committee, remarked:

> "Mr. Smathers . . . we protected the right of the States . . . by leaving to the State regulatory agencies the right to regulate and have a final decision with respect to the discontinuance of train service which originated and ended within one particular State, except when it could be established that intrastate service was a burden on interstate commerce.
>
> "In addition, the Senate receded on a provision under which we had given the Interstate Commerce Commission jurisdiction also to discontinue service in depots, terminals, and other such facilities in connection with the operation of railroads. We left the matter in the hands of the State regulatory agencies." *104 Cong. Rec. 15528* (1958).

In sum, every care was taken to preserve states' rights. The jurisdiction relinquished was that over a ferry or train running in interstate commerce—the discontinuance of either constituting something less than a complete abandonment, thereby depriving the I. C. C. of jurisdiction over interstate commerce under pre-existing law, 49 U. S. C. §1(18). The legislation goes no further. Moreover, there was never any doubt in anyone's mind that intrastate train service should remain the province of the respective states.

It is respectfully submitted that a proposition never conceived, debated nor enacted by the Congress (intrastate train service plus interstate bus service equals interstate

train) should not be grafted onto the statute by construction. For what is really urged by the Appellee herein is the writing of a new law. The proper relief for Appellee under existing law is found under section 13a(2) of the I. C. C. Act which deals with intrastate railroad service. Hence, the lower Court was wrong in upsetting the I. C. C. decision which held that the proposed train discontinuance was wholly intrastate and, thus a matter for the Board.

Conclusion.

The questions presented by this appeal are substantial and of urgent importance to the State of New Jersey and its Board of Public Utility Commissioners. They are also of national importance because of the principles involved and because of the effect of the decision below on the jurisdiction of other states and their respective utility commissions. We respectfully ask that probable jurisdiction be noted.

Respectfully submitted,

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Dated: May 3, 1962.

Appendix A.

Opinion of the District Court filed December 7, 1961 and reported in 200 F. Supp. 860.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF NEW JERSEY, and BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,
Defendants.

CIV. A. No. 401-61.

United States District Court
D. New Jersey.

Dec. 7, 1961.

Proceeding for review of denial by Interstate Commerce Commission of railroad's petition for reconsideration of its order dismissing for lack of jurisdiction proceeding instituted by railroad for discontinuance of operation. The three judge District Court, Wortendyke, J. held that Commission, under statute dealing with discontinuance of operation of service of train operating from point in one state to point in another state, had jurisdiction of railroad's proceeding for discontinuance of combination train and bus service furnishing passenger carriage between New York and New Jersey, although all of railroad's tracks were in New Jersey and it contracted with another company for buses to carry passengers from New Jersey to New York.

Reversed.

McLaughlin, Circuit Judge, dissented.

LUM, BIUNNO & TOMPKINS, by VINCENT P. BIUNNO, Newark, N. J., for plaintiff.

DAVID M. SATZ, JR., U. S. Atty., Newark, N. J., by RAYMOND W. YOUNG, Asst. U. S. Atty., North Bergen, N. J., and H. NEIL GARSON, Washington, D. C., for the United States and Interstate Commerce Commission; JOHN H. D. WIGGER, LEE LOEVINGER, C. H. JOHNS, JR., ROBERT W. GINNANE, Washington, D. C., of counsel.

DAVID D. FURMAN, Atty. Gen. of New Jersey, by RICHARD GREEN, Deputy Atty. Gen., for State of New Jersey and Bd. of Public Utility Com'rs.

Before McLAUGHLIN and FORMAN, Circuit Judges, and WORTENDYKE, District Judge.

WORTENDYKE, District Judge.

In this action the plaintiff, Susquehanna, seeks a judgment setting aside two certain "orders" of the Interstate Commerce Commission made on January 18, 1961 and May 10, 1961, respectively.

This Court has jurisdiction by virtue of the provisions of 28 U. S. C. §1336, which is being exercised appropriately as a three-judge court in accordance with the procedure prescribed by §§2321 to 2325 inclusive, and §2284 of the same Title.

The Commission's order of May 10, 1961 was a denial of a petition for reconsideration of its order of January 18, 1961. Thus plaintiff exhausted its administrative remedy before the Commission before coming here. 49 U. S. C. A. §17(9); United States v. Abilene & Southern Railway Co., 1924, 265 U. S. 274, 44 S. Ct. 565, 68 L. Ed. 1016.

Susquehanna operates a line of railroad as a common carrier for the transportation of passengers from Butler, New Jersey, to New York City. For its corporate history, see In re New York, S. & W. R. Co., 3 Cir. 1940, 109 F. 2d 988. The railroad runs three passenger trains in each

direction daily, except Saturdays, Sundays and holidays, during commuters' hours only, and no mail, baggage or express is handled thereon. If the operation of these trains is discontinued, no passenger service will be furnished by the carrier. Each train consists of a single-unit diesel locomotive and a single trailing passenger car, and has a crew consisting of an engineer, a fireman, a conductor and a brakeman. Although its trains do not travel eastwardly of a transfer point in North Bergen, New Jersey, its passengers for and from New York City are transported by bus, via the Lincoln Tunnel beneath the Hudson River, between that transfer point and the bus terminal of the Port of New York Authority at 41st Street and Eighth Avenue, in Manhattan. The buses so employed are owned and operated by Public Service Coordinated Transport, a New Jersey corporation, unaffiliated but under contract with the plaintiff.

Susquehanna emerged from reorganization proceedings under §77 of the Bankruptcy Act, 11 U. S. C. A. §205, in 1953. For the year 1960, the cost of operating the trains which Susquehanna seeks to discontinue, including depreciation of locomotives and cars, is alleged to exceed the revenues therefrom by $117,214.

The provisions of Part I of the Interstate Commerce Act apply to Susquehanna. Its railroad includes terminal facilities for the transportation of its passengers and such transportation includes a contract bus service as an instrumentality or facility for the carriage of its passengers between its transfer point in New Jersey and its terminal in New York. Such bus transportation must be considered as performed by Susquehanna, and is subject to regulation "in the same manner as, the transportation by railroad * * * to which such (bus) services are incidental." 49 U. S. C. A. §302 (c). See New York Dock Railway *v.* Pennsylvania Railroad Co., 3 Cir., 1933, 62 F. 2d 1010, cert. den. 289 U. S. 750, 53 S. Ct. 694, 77 L. Ed. 1495; United States *v.* Motor Freight Express, D. C. N. J. 1945, 60 F. Supp. 288. The Interstate Commerce Commission has regulatory jurisdic-

tion over Susquehanna and its contract bus facility despite the fact that the railroad is a New Jersey corporation whose entire trackage is within that State. Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission, 1896, 162 U. S. 184, 16 S. Ct. 700, 40 L. Ed. 935; Interstate Commerce Commission v. Detroit, Grand Haven & Milwaukee Railway Co., 1897, 167 U. S. 633, 642, 17 S. Ct. 986, 42 L. Ed. 306. The Commission has recognized and exercised that jurisdiction. See New York, S. & W. R. Co., Common Carrier Application (1942) 34 M. C. C. 581; on rehearing (1946) 46 M. C. C. 713. See also Commutation Fares, New York, S. & W. R. Co. (1951) 280 I. C. C. 31. In its Local Passenger Tariff S-W. 11, issued September 10, 1960, effective September 21, 1960, under Authority of Special Permission of the Interstate Commerce Commission in Finance Docket No. 20567, New York, Susquehanna & Western Railroad Company—Abandonment of Operation Jersey City, N. J., dated August 8, 1960, plaintiff carrier advertises its fares for passenger transportation throughout its line extending between New York, N. Y., and Butler, N. J.; an aggregate distance of 37.9 miles. Paragraph 11 of the carrier's Rules and Regulations, published in its said Tariff, is captioned, and reads as follows:

> "Mofor-Coach Terminal Service—New York, N. Y.
>
> "Available only to passengers holding tickets reading as described in paragraph 1 below, upon payment of charge shown in paragraph 2 below:
>
> "1. To or from stations on the New York, Susquehanna and Western Railroad Company, Babbitt, N. J., and stations West thereof, on the one hand, and New York, N. Y., via the Susquehanna Transfer, N. J., on the other.
>
> "2. Motor-coach fare in each direction between North Bergen, N. J. and New York, N. Y. 25 cents."

Erie's discontinuance of its ferry service pursuant to the provisions of 49 U. S. C. A. §13a(1) had deprived plaintiff of the availability of this ferry service for its passenger transportation into and out of New York City. For background history of the Erie passenger ferry abandonment, see State of New Jersey et al. *v.* United States et al., D. C. N. J. 1958, 168 F. Supp. 324, aff'd. Bergen County *v.* U. S., 1959, 359 U. S. 27, 79 S. Ct. 607, 3 L. Ed. 2d 625, reh. den. 359 U. S. 950, 79 S. Ct. 722, 3 L. Ed. 2d 683.

On December 30, 1960 Susquehanna filed with the Interstate Commerce Commission, pursuant to the provisions of section 13a(1) of the Interstate Commerce Act, a Notice that the carrier would discontinue service of all of its passenger trains described as "operating" between Butler, New Jersey and New York City and serving various intermediate stations in New Jersey en route. A copy of plaintiff's Notice was served by mail, on December 29, 1960, upon the Governor of the State of New Jersey, the Secretary of the Board of Public Utility Commissioners of the State of New Jersey, the Governor of the State of New York, the Secretary of the Public Service Commission of the State of New York, the Assistant Postmaster General, and the Railway Labor Executives' Association, and posted in each of Susquehanna's railroad stations, in the Port of New York Authority Bus Terminal in New York City, in each of the motor coaches operated by Public Service Coordinated Transport which carry passengers from and to plaintiff's trains, and in each passenger car of each of those trains.

On January 9, 1961, the State of New Jersey and its Board of Public Utility Commissioners filed a petition with the Interstate Commerce Commission praying that an investigation of plaintiff's proposed train discontinuance be entered upon by the Commission, and that plaintiff's Notice be dismissed without prejudice, upon the ground that its case before the Commission was improperly brought under section 13a(1). To that petition Susquehanna filed an Amended Reply on February 20, 1961, wherein the car-

rier joined issue upon the contentions made in the petition.[1] By order of Division 4 of the Commission, made on January 18, 1961, the proceeding instituted by plaintiff's Notice was dismissed for lack of jurisdiction because the Commission found that each of the trains proposed to be discontinued by the plaintiff operates solely within the State of New Jersey. The Commission concluded that Susquehanna's Notice, was, therefore, improperly filed under section 13a (1) of the Act. On February 20, 1961, the Railroad filed a Petition for Reconsideration of the Commission's order of January 18, 1961. The Petition for Reconsideration was denied by the Commission's order of May 10, 1961.

The Commission's refusal to reconsider its order denying jurisdiction of the proceeding instituted by the plaintiff under section 13a(1) of the Act constitutes a proper basis for the exercise of the jurisdiction of this Court created by 49 U. S. C. A. §17(9) and 28 U. S. C. 1336. The present action presents the single question whether the provisions of section 13a(1) have been appropriately invoked by the plaintiff for the purpose of effecting a discontinuance of its passenger trains enumerated in the Notice filed with the Commission. The position of the defendants in the case is disclosed in their contention that section 13a(1) is applicable only to the discontinuance of "the operation or service of any train or ferry operating from a point in one State to a point in any other State." Because the trains which plaintiff would discontinue do not actually run across the dividing line between New Jersey and New York, but only between points within the State of New Jersey, defendants argue that application for relief before the Interstate Com-

[1] Carrier's amended reply to the petition of the State and Board disclosed that day-to-day counts of interstate and intrastate passengers using each of the trains which carrier desired to discontinue showed the following daily averages:

Train No.	Total	Interstate	Intrastate
908	47.7	39.7	8.0
910	126.4	120.1	6.3
916	112.5	91.2	21.3
919	47.9	31.5	16.4
923	120.1	118.6	1.5
929	37.0	34.5	2.5

merce Commission is governed by subsection 13a(2).[2] Defendants United States and Interstate Commerce Commission further assert that "the Legislative history of section 13a(1) supports the view that it is intended to allow discontinuance of only trains or ferries, but not of all the rail transportation operation from a point in one State to a point in another State."[3] They do not deny that plaintiff

[2] The Conference Report upon S—3778, 85th Cong. 2d Sess. (2 U. S. Code Cong. & Adm. News 1958, pp. 3456, 3486), has this to say respecting the proposed new section 13a embodied in section 5 of the Bill: "Paragraph (1) deals with the discontinuance or change of the operation or service of a train or ferry—operating from a point in one State to a point in any other State • • • A procedure is set up whereby the carrier or carriers concerned may discontinue or change the operation or service (notwithstanding State law) upon giving 30 days' notice to the Interstate Commerce Commission (as well as certain other notice) of intention to do so.

"Paragraph (2) of the proposed new section 13a. • • • deals with the discontinuance or change, in whole or in part, by a carrier or carriers of the same class referred to in paragraph (1), of the operation or service of any train or ferry operated 'wholly within the boundaries of a single State.' The paragraph would operate where such carrier or carriers desire to discontinue or change any such operation or service, and where (1) the discontinuance or change is prohibited by the constitution or statutes of a State; (2) where the State authority having jurisdiction has denied an application duly filed for authority to discontinue or change the operation or service, or (3) where the State authority having jurisdiction shall not have acted finally on such application within 120 days from the presentation thereof. • • •"

[3] If the plaintiff intends to terminate *all* railroad transportation over its line between Butler, New Jersey and New York City, the Commission would have clear jurisdiction to entertain its application for leave to do so under section 1(18) of the Act. This Court has already stated in Board of Public Utility Commissioners v. United States, 1957, 158 F. Supp. 98, at page 100, that "It is equally sound that the Commission possesses the right to allow complete abandonment of a railroad branch line though the latter be located wholly within a state. State of Colorado v. United States, 1926, 271 U. S. 153, 46 S. Ct. 452, 70 L. Ed. 878. Under that opinion if the contemplated stoppage of the Weehawken passenger ferry effects the complete abandonment of a line of railroad or portion of a line of railroad, the Commission's action was proper. If it is merely the elimination of part of the service of that line, the Commission has no justification for assuming control of the proceeding." That language was used before the new section 13a became law. We are not here called upon to determine whether the Commission in the present case derives jurisdiction from §1(18).

is an interstate carrier, and they concede that it performs its interstate function in part by the use of the contract bus service into and from New York City.

While the defendants are correct in asserting that the trains which the plaintiff seeks to discontinue *move* exclusively within the State of New Jersey, the interstate *transportation* of passengers which the plaintiff is authorized and required by the Commission to provide (49 U. S. C. A. §1(4)), is achieved only by means of the combined facilities of those trains and of the bus service which complements them. While it is also true that section 13a(1) contains the significant phrase "the operation or service of any train or ferry," referring to the particular transportation which may be discontinued or changed upon compliance with the other provisions of the section, we are unable to agree with the insistence of defendants that the word "operation" must be equated to "movement". There being no provision in the Act which makes such definition mandatory, we are at liberty to apply the ordinary meaning of the term, which, when used intransitively, means to work, act, or function. To strictly construe 13a(1) as applicable only to a train or ferry as an instrumentality of interstate transportation is to disregard other provisions of the statute, and thwart the apparent purpose of the Congress in adopting it. In construing remedial legislation, narrow or limited construction is to be eschewed. Rather, in this field, liberal construction in the light of the prime purpose of the legislation is to be employed. St. Mary's Sewer Pipe Co. *v.* Director of U. S. Bureau of Mines, 3 Cir., 1959, 262 F. 2d 378; citing Lilly *v.* Grand Trunk Western R. Co., 1943, 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 411; Swinson *v.* Chicago, St. Paul, M. & O. Ry., 1935, 294 U. S. 529, 55 S. Ct. 517, 79 L. Ed. 1041; Sablowsky *v.* United States, 3 Cir., 1938, 101 F. 2d 183. The Act must be read and considered as a whole in the light of national transportation policy. American Trucking Associations, Inc. *v.* United States, D. C. D. C. 1959, 170 F. Supp. 38.

In Board of Public Utility Commissioners of the State of New Jersey et al. *v.* United States, 1957, 158 F. Supp. 98,

this Court held that the proposed discontinuance by the New York Central Railroad Company of its passenger ferries between points in New Jersey and the City of New York would constitute but a partial abandonment of a portion of a line of its railroad, which the Interstate Commerce Commission then had no authority to permit, because 49 U. S. C. A. §1(18) provided only for the abandonment of "all or any portion of a line of railroad." Accordingly, this Court set aside a certificate granted by the Commission, authorizing the railroad to discontinue its passenger service while continuing to transport freight by surface vessel across the Hudson River. In that case the adoption of the Transportation Act of 1958 was foreseen by the Court when it said, at p. 103 of the opinion: "The Congress may in its wisdom decide to grant the requisite authority, although as yet there is no intimation of this from the legislative history, but until such time, the Commission, strictly a creature of its creating statute, is without the power to permit the discontinuance of this partial service." [158 F. Supp. 103.] It is quite obvious that this Court's construction of section 1(18) of the Transportation Act of 1920 emphasized the need of congressional legislation to permit of the very relief which this Court had found unavailable. The answer to that need was ultimately given in section 13a(1) of the Transportation Act of 1958. Accordingly, by invoking the provisions of this newly added section, other railroads successfully achieved the discontinuance of passenger ferry service across the Hudson River, while still continuing to operate as interstate common carriers by rail. (State of New Jersey et al. *v.* United States et al., supra) It seems to follow inevitably that the contract buses, by means of which plaintiff had been performing its service as an interstate carrier, must be considered, as were the ferry facilities, to constitute a portion of plaintiff's line of railroad within the jurisdiction of the Commission.

The exclusiveness of the Commission's jurisdiction over terminal facilities and interterminal services of interstate carriers was emphasized in Central Transfer Co. *v.* Terminal Railroad Association of St. Louis, 1933, 288 U. S. 469,

53 S. Ct. 444, 77 L. Ed. 899, and in City of Chicago *v.* Atchison, T. & S. F. Ry. Co., 1958, 357 U. S. 77, 78 S. Ct. 1063, 2 L. Ed. 2d 1174. In the latter case a municipal ordinance required that a motor carrier serving interstate connecting railroads for the transportation of passengers across the City, first obtain a certificate of convenience and necessity from the Commissioner of Licenses, and the approval of the City Council, before it could lawfully engage in that business. The United States Supreme Court held that the Interstate Commerce Act, 49 U. S. C. A. §1 et seq., precluded the City from exercising any veto power over the transfer service when performed by the interstate railroads or by their chosen agents because such service was (p. 86, 78 S. Ct. at p. 1068) "at least authorized, if not actually required, under the Act as a reasonable and proper facility for the interchange of passengers and their baggage between connecting lines," and "§302(c) of the Act provides that motor vehicle transportation between terminals, whether performed by a railroad or by an agent or a contractor of its choosing, shall be regarded as railroad transportation and shall be subject to the same comprehensive scheme of regulation which applies to such transportation." Further, at pp. 87 and 88 of the same opinion, 78 S. Ct. at p. 1069 we find an interpretation of congressional policy in the following language of Mr. Justice Black: "The various provisions set forth above manifest a congressional policy to provide for the smooth, continuous and efficient flow of railroad traffic from State to State subject to federal regulation. In our view it would be inconsistent with this policy if local authorities retained the power to decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers. • • • National rather than local control of interstate railroad transportation has long been the policy of Congress. It is not at all extraordinary that Congress should extend freedom from local restraints to the movement of interstate traffic between railroad terminals."

In Transit Commission *v.* United States, 1933, 289 U. S. 121, 53 S. Ct. 536, 77 L. Ed. 1075, the language of section

1(18) of the Act was held to apply to a trackage agreement which enabled an interstate carrier to extend its traffic beyond its own terminus over the line and to and from the terminus of another carrier. At page 127 of the opinion in that case, 53 S. Ct. at page 538, the Court states that: "Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened, and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for. * * * (Continuing on p. 128 [53 S. Ct. at p. 538].) * * The Act, including paragraph (18) and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate." See also Southern Railway Co. *v.* Reid, 1912, 222 U. S. 424, 32 S. Ct. 140, 56 L. Ed. 257.

All parties concede that the question which we are called upon to answer is whether, under the circumstances disclosed in Susquehanna's petition to the Commission, relief should be afforded under subdivision (1) or under subdivision (2) of section 13a of the Act. Plaintiff has been, and is now discharging its obligation as an interstate railroad common carrier by a combination of train and bus service, furnishing passenger carriage between New York and New Jersey. The bus service complements that of the train; the train service complements that of the bus. In combination the two facilities operate from a point or points in one State to a point in another State. A construction of the language employed in subdivision (1) of section 13a which would involve a divorcement or limitation of the jurisdiction of the Commission, and the intrusion of that of the Board of Public Utility Commissioners over the existing facilities employed by Susquehanna, would preclude the attainment of the objective obviously contemplated by the Congress.

We, therefore, conclude that the Commission had jurisdiction over the proceeding instituted by Susquehanna under the provisions of section 13a(1) and that its order of January 18, 1961 refusing to take jurisdiction thereof was contrary to law, and should be reversed.

McLAUGHLIN, Circuit Judge (dissenting).

Prior to the enactment of Section 13a(1) of the Interstate Commerce Act there was no authority then existing which countenanced abandonment by a carrier of its passenger ferry service between New Jersey and New York. Board of Public Utility Commissioners of New Jersey *v.* United States, 158 F. Supp. 98 (D. C. N. J. 1957). Thereafter the present Section 13a(1) was added to the Interstate Commerce Act, 49 U. S. C. A. §13a(1) effective August 12, 1958. That specifically gave carriers, subject to the mechanics of the section, the right "*to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State* • • •." (Emphasis supplied.)

There is no denial that the section was directed to a particular train or ferry and the legislative history makes this crystal clear. The section was used almost immediately for its avowed purpose, i. e. to justify the extinguishment of the passenger ferry with which the Board of Public Utility Commissioners, etc. litigation, supra, was concerned and of the Erie passenger ferry (also used by complainant). See State of New Jersey *v.* United States, 168 F. Supp. 324 (D. C. N. J. 1959) (New York Central case); State of New Jersey *v.* United States (Erie and New York, Susquehanna case), 168 F. Supp. 342 (D. C. N. J. 1959). As finally passed, there was not the slightest idea that §13a(1) could be at all available regarding "any train which operates within a State, whose origin and destination are within the State—that is, any train with intrastate characteristics—together with the facilities used by the train, shall be completely under the authority of the State public utilities commission, and shall not be in any way affected by the language of this

particular proposal, to which the Senator from Georgia objects." Declaration by Senator Smathers, author of the then bill, 104 Cong. Rec. June 11, 1958 p. 10852. At p. 10854 of the same record Senator Smathers stated an underlying principle of the amendment to be that "If a train originates within a State * * * and ends within a State, without crossing a State line, that particular train could be discontinued only with the approval of the State regulatory agency, under the amendment." There was never any change in that fundamental concept, suggested or authorized. Throughout the legislative history it is plain that, aside from a particular train, the only other item to be covered by the amendment was a ferry. Buses were neither mentioned or considered. It definitely was never intended by Senator Smathers that an element foreign to the avowed objective of the legislation be concealed within his frank commitment and urged later as coming under §13a(1). The Interstate Commerce Commission itself, which had so readily acquiesced in the end of the mentioned passenger ferry service between New Jersey and New York, at no time ever attempted to distort the meaning of §13a(1) by construing it as allowing discontinuance of purely intrastate trains because buses took passengers from them at the end of the railroad in New Jersey and transported them to New York.

The statute is a lean, lucid law. It cannot be misconstrued as it stands. The majority opinion refuses to take on that impossible task. So it rests its reversal of the Interstate Commerce Commission on the proposition that what the latter does in its decision is "thwart the *apparent* purpose of Congress in adopting it." (Emphasis supplied.) Actually, the true purpose of Congress is expressed in the unmistakable language of §13a(1) itself. That language cannot be wrenched apart to absorb the expedient endeavor to do now what was never contemplated when the amendment was enacted.

It is argued that "bus" must be taken as included in the "service of any train". That cannot conceivably make sense where "ferry", no more or less important in the circum-

stances than "bus", was deliberately and directly named and the phrase "service of any" applied to it exactly as to "train". If §13a(1) had been meant to contain the power to wipe out an entire intrastate railroad passenger service by tying it into the interstate connecting buses, the word "bus" would have been placed in the amendment as was the word "ferry". If that had occurred, in all probability, the amendment would never have passed the Senate. It does seem rather conclusive that all of the legislative history re the amendment, both affirmative and negative, vividly establishes that its language is meaningful and is exactly what was agreed to.

The railroad objects to the definition of a "train" as given by the United States Supreme Court in United States v. Erie R. R., 237 U. S. 402, 407, 35 S. Ct. 621, 624, 59 L. Ed. 1019 (1915), where the Court said that a train "* * * consists of an engine and cars which have been assembled and coupled together for a run or trip along the road." The railroad would put this in the same category as Miss Stein's "a rose is a rose * * *." It might be noted that to date, a rose is still a rose. Also that as far as Section 13a(1) of the Interstate Commerce Act is concerned, within its categorically limited purpose and language, a "bus" is neither "* * * the operation or service of any train or ferry operating from a point in one State to a point in any other State * * *."

For plaintiff to prevail the Interstate Commerce Commission must be held to have grievously erred in law by concluding it had no jurisdiction to permit the railroad to divest itself of its passenger service. Even on this legal question, the Commission's deep, special knowledge of the problem in this case is of the utmost importance. Admittedly it had no right to sanction abandonment of New Jersey—New York harbor ferries until section 13a(1) became the law. Admittedly it was completely familiar with the Smathers bill. It knew that under the resultant amendment to the Act, it was given the power to approve the discontinuance of a single train or ferry. If knew the amendment went no further than that. It knows that the kind of control

involved in this action or otherwise was never sought for the Commission in §13a(1) by complainant, other carriers or anyone else. The Commission therefore rightly refused to accept complainant's present fantastic interpretation of Section 13a(1) proffered, not with any claim that it was ever dreamt of when §13a(1) was passed, but under the transparently unsupportable suggestion that "bus" must be taken as part of §13a(1) since the latter is "remedial legislation". In view of the success in obtaining legislation to do away with the ferries an equivalent result might be obtained as to buses. But meanwhile, the passenger trains, which plaintiff seeks to discontinue, operate solely within the State of New Jersey and the matter of their discontinuance is not within the jurisdiction of the Interstate Commerce Commission.

I would therefore uphold the Commission's dismissal of the proceeding.

Appendix B.

Final Judgment of the District Court Dated January 9, 1962.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

CIVIL ACTION, No. 401-61.

NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY,
Plaintiff,
vs.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, STATE OF NEW JERSEY, and BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY,
Defendants.

Final Judgment.

This matter having come on for trial in the presence of Lum, Biunno & Tompkins (by Vincent P. Biunno, Esq.), attorneys for plaintiff, David M. Satz, Jr., Esq. (by Raymond A. Young, Esq.), United States Attorney, and H. Neil Garson, Esq., attorneys for the defendants United States of America and Interstate Commerce Commission, with John H. D. Wigger, Esq., Lee Loevinger, Esq., C. H. Johns, Esq., and Robert W. Ginnane, Esq., of Counsel with the defendant United States of America, and David D. Furman, Esq. (by Richard Green, Esq.) Attorney General of the State of New Jersey, attorney for the defendant State of New Jersey and Board of Public Utility Commissioners of the State of New Jersey; and the court having examined and considered the record and order before it, and having

heard and considered the argument and briefs of counsel thereon,

IT IS, on this 9th day of January, 1962, ORDERED that final judgment be and it hereby is entered, determining that the provisions of section 13a(1) of the Interstate Commerce Act (49. U. S, C. sec. 13a(1)) were appropriately invoked by the plaintiff for the purpose of effecting a discontinuance of its passenger trains enumerated in the Notice filed with the defendant Interstate Commerce Commission; that said Commission had jurisdiction over the proceedings so instituted and that its order of January 18, 1961, under review, was contrary to law and is hereby permanently suspended, enjoined, annulled and set aside;

And good cause appearing it is further ordered that the plaintiff railroad, its officers, agents, servants and attorneys are hereby restrained and enjoined from discontinuing passenger service under its said Notice or under this judgment, until the further order of this Court, pending appeal by the defendants to the Supreme Court of the United States; W. Jr. without costs.

(s) PHILLIP FORMAN
C. J.

(s) REYNIER J. WORTENDYKE, JR.
D. J.

Circuit Judge Gerald McLaughlin notes his dissent, except as to the foregoing restraint.

Appendix C.

Initial Order of the I. C. C. Dated January 18, 1961, Not Yet Reported, Dismissing for Lack of Jurisdiction the Appellee's Notice Filed December 30, 1960.

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of January, A. D. 1961.

Finance Docket No. 21417.

New York, Susquehanna and Western Railroad Company Discontinuance of Passenger Service Between New York, N. Y., and Butler, N. J.

It appearing, That on December 30, 1960, the New York, Susquehanna and Western Railroad Company filed with this Commission notices purportedly under section 13a(1) of the Interstate Commerce Act, as amended, that effective January 30, 1961, said carrier will discontinue service of its passenger trains Nos. 908, 910, 916, 919, 923, 929 and 915 allegedly operating between Butler, N. J., and New York, N. Y., serving numerous intermediate stations;

It further appearing, That by petition filed January 9, 1961, the State of New Jersey and its Board of Public Utilities Commissioners request this Commission to enter upon an investigation of the proposed discontinuance and petitioners move that the instant proceeding be dismissed without prejudice since the trains actually operate between Butler, N. J., and the Susquehanna Transfer, a point also situated within the State of New Jersey, and in view thereof the proposal does not fall within the purview of section 13a(1) of the Interstate Commerce Act since the trains actually operate solely within the State of New Jersey and not "from a point in one State to a point in any other State" as provided by said section 13a(1);

IT FURTHER APPEARING, That each of the trains proposed to be discontinued operate solely within the State of New Jersey and that therefore the said notice filed December 30, 1960, by the New York, Susquehanna and Western Railroad does not constitute a notice properly filed under the provisions of Section 13a(1) of the Interstate Commerce Act;

IT IS ORDERED, That the notice filed December 30, 1960, by the New York, Susquehanna and Western Railroad in the instant proceeding be, and it is hereby, dismissed for lack of jurisdiction.

By the Commission, Division 4.

HAROLD D. McCOY
Secretary

(SEAL)

Appendix D.

Order of the I. C. C. Dated May 10, 1961 Denying Appellee's Motion for Reconsideration of the I. C. C.'s Order of January 18, 1961.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 10th day of May, A. D. 1961.

FINANCE DOCKET NO. 21417.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY
DISCONTINUANCE OF PASSENGER SERVICE BETWEEN
NEW YORK, N. Y., AND BUTLER, N. J.

Upon consideration of (1) the notice and supporting data filed December 30, 1960, by the New York, Susquehanna and Western Railroad Company under section 13a(1) of the Interstate Commerce Act proposing discontinuance of certain passenger trains allegedly operating between Butler, N. J., and New York, N. Y., (2) the order of the Commission, Division 4, dated January 18, 1961, dismissing said notice for lack of jurisdiction, (3) documents dated January 27 and February 17, 1961, by said railroad titled Reply to Petition of State of New Jersey and its Board of Public Utility Commissioners and Request for Extension of Time and Amended Reply, and (4) a petition, filed February 20, 1961, by said railroad requesting reconsideration of the Commission's order dated January 18, 1961; and

IT APPEARING, That a so-called Petition of the State of New Jersey and its Board of Public Utility Commissioners constituted one of approximately 100 protests to the discontinuance proposal of the railroad and was received and treated as such; that the documents filed by New York, Susquehanna and Western Railroad Company titled Reply

and Amended Reply to Petition of the State of New Jersey, etc., constitute a reply to said protest;

IT FURTHER APPEARING, That due and timely execution of the Commission's functions under the provisions of section 13a(1) imperatively require that a decision be reached in respect to a notice filed thereunder prior to the proposed effective date of said notice, and, thus, preclude deferment of a decision awaiting the filing of replies to protests or other pleadings;

IT FURTHER APPEARING, That the material matters set forth in said reply and amended reply have been incorporated in said petition for reconsideration filed February 20, 1961, that said petition has been considered and that no showing has been made warranting reconsideration of the said order of January 18, 1961, dismissing said notice for want of jurisdiction;

IT IS ORDERED, That said petition be, and it is hereby, denied.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

Appendix E.

§ 13a. Discontinuance or change of the operation or service of trains or ferries; notice; investigation; hearing; determination

(1) A carrier or carriers subject to this chapter, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by orders served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not

for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

(2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit

of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hearing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph. Feb. 4, 1887, c. 104, Pt. I, § 13a, as added Aug. 12, 1958, Pub. L. 85-625, § 5, 72 Stat. 571.